No. 83-935

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CLYDE ABEL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a witness may properly be impeached by showing that he and the party for whom he testifies belong to a group whose members are sworn to commit perjury on each other's behalf.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 707 F.2d 1013.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983, and amended on June 6, 1983. A petition for rehearing was denied on September 7, 1983 (Pet. App. 11a). On October 26, 1984, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 6, 1983. The petition was filed on that date and was granted on March 19, 1984 (J.A. 50). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and sentenced to 25 years' imprisonment (Pet. App. 1a).[1] A divided panel of the court of appeals reversed his conviction.

1. On September 8, 1981, four men robbed the Bellflower Savings and Loan Association in Bellflower, California (1 Tr. 123-128, 131; 2 Tr. 190-192; GX 11, 12).[2] A witness observed the license number of the get-away car, a white Camaro, and the FBI determined that the car was registered to Anna Sainz (1 Tr. 130-131; 2 Tr. 194; GX 9, 10, 18).

Later that day, several members of the Los Angeles County Sheriff's Office interviewed Sainz at her home (2 Tr. 202-203, 206-216, 284). She told the officers that she had loaned the car that morning to respondent, who had left in it with her housemate Ronald Gremard and another man (2 Tr. 196, 198, 208, 214-215). She said that respondent and Gremard had later returned the car and had departed again in respondent's Ford pickup truck (2 Tr. 198-202). Sainz said that she expected them both to return that evening (2 Tr. 201). The officers searched the house with Sainz's consent and found a bank bag in one of the bedrooms (2 Tr. 263-265, 285; GX 2). They then

[1] Ronald Gremard and Kurt Edward Ehle, who were indicted together with respondent, pleaded guilty. As part of his plea bargain, Ehle testified for the government (Pet. App. 2a).

[2] Bank employees and a bank visitor identified respondent from a photo spread as one of the armed robbers who appears in a bank surveillance photograph (1 Tr. 71-73, 79-80, 87-89, 105-108, 121-122, 136-138, 140-141, 143, 150, 152-153; 2 Tr. 229, 308-311; GX 16).

awaited the return of respondent and Gremard (2 Tr. 265-269, 275-276).

After dark, respondent and Gremard returned to the house in a Ford pickup truck and were arrested (2 Tr. 202-203, 205-206, 265-269, 275-276). The officers seized some clothing from the seat of the pickup (2 Tr. 286-287, 291-292; GX 8). A search of respondent's person at the police station uncovered a bait bill from the Bellflower Savings and Loan, as well as eight Susan B. Anthony silver dollars alleged to have been taken in the robbery (1 Tr. 113-115; 2 Tr. 288-290, 292-293; GX 4, 5, 23A).

At trial, Kurt Ehle, one of respondent's co-defendants, testified for the government and implicated respondent as one of the bank robbers. Respondent called Robert Mills to impeach Ehle (J.A. 32-40). Mills, who was imprisoned with Ehle and respondent and had been friendly with them both, testified that Ehle had said that he intended to give false testimony identifying respondent as one of the robbers in order to obtain a more lenient sentence (Pet. App. 4a; J.A. 33-35).

Before trial, in anticipation of Mills's testimony, the prosecution had apprised the district court that Mills, Ehle, and respondent were all members of a prison gang called the "Aryan Brotherhood."[3] According to the prosecutor's offer of proof, a tenet of the Aryan Brotherhood requires its members to deny the existence of, and their membership in, the organization and to lie to protect fellow members (J.A. 24). Anticipating that effective cross-examination of Mills

[3] The Aryan Brotherhood is "a white supremacist prison gang." *United States* v. *Mills*, 704 F.2d 1553, 1555 (11th Cir. 1983), petition for cert. pending, No. 83-5286.

could not avoid reference to the Aryan Brotherhood, the prosecutor had sought guidance from the district court (J.A. 8-9).[4]

Defense counsel objected to cross-examination regarding the Aryan Brotherhood on narrow grounds. She conceded that Mills's membership in the Aryan Brotherhood was relevant but stated (J.A. 29):

> I think, your Honor, it would be relevant, but only as far as asking, for example, "Isn't it true that you belong to an organization where you try to protect each other?," or "Isn't it true that you belong to an organization that you would be willing to lie for another member?" I think that's the farthest that something like that should be allowed to get to, but not the mention of "Aryan Brotherhood" or any other organization that has the type of connotations that the Aryan Brotherhood has.
>
> * * * * *
>
> Your Honor, I think * * * it's too prejudicial to be allowed in a trial.

At no time during the lengthy discussion of this issue did defense counsel object to references to the Aryan Brotherhood on the ground that such examination would unconstitutionally impinge upon respondent's associational rights. Nor did Mills's attorneys, who were present to advise him, voice any concern about the impact of the examination upon their client's constitutional rights (J.A. 31, 38).

At the conclusion of all the pretrial argument, the trial judge held that the evidence was admissible and

[4] The district court considered the question at length during hearings in chambers (J.A. 8-32). The court received offers of proof regarding Mills's and Ehle's testimony (J.A. 10, 15, 23-26) and heard the argument of counsel.

that its probative value outweighed any possibility of prejudice (J.A. 29). He also asked counsel to request a side-bar conference before using the term "Aryan Brotherhood" during trial (J.A. 32).

Accordingly, before cross-examining Mills on his membership in the Aryan Brotherhood, the prosecutor requested a side-bar conference and outlined the questions he proposed to ask (J.A. 38). Defense counsel responded (*ibid.*) that "the U.S. Attorney may perhaps get into whether they belong to any organization," but she objected to any "reference to the Aryan Brotherhood or * * * any kind of motto."[5] The court therefore ruled that the prosecutor should refer to a "secret prison organization" rather than naming the Aryan Brotherhood (J.A. 38-39). Although this ruling appeared to eliminate defense counsel's sole ground for objection, she objected without explanation when Mills was asked the following questions (J.A. 39):

> Q. Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?
>
> A. No, I don't.
>
> Q. Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that the members

[5] The prosecutor's offer of proof indicated that the organization's motto is "Blood in, Blood out," which means that "[t]he only way you get out of it is to get killed and the only way you get into it is either kill somebody yourself or be present when somebody is killed and participate in it." J.A. 24, 25. See *United States* v. *Silverstein*, No. 82-2453 (7th Cir., Apr. 26, 1984), slip op. 2. This evidence was not introduced.

thereof will first of all deny they belong to that secret organization?

A. No, I don't.

Q. And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in that secret organization, prison organization?

A. I know of no organization like that.

In rebuttal, the government called Ehle, who testified that both Mills and respondent were members of a secret prison organization whose members were pledged to deny the organization's existence and to "lie, cheat, steal [and] kill" to protect other members (Pet. App. 6a; J.A. 43).[6] Defense counsel stated (J.A. 43) that she objected "under [Fed. R. Evid.] 608 and 403" but did not elaborate.

The judge offered upon request to instruct the jury not to consider Ehle's testimony for any purpose other than assessing Mills's credibility (J.A. 30-31). Respondent did not request such an instruction.[7]

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[6] Ehle knew that Mills and respondent were members of the Aryan Brotherhood because respondent, whom Ehle had known "for a good many years" (J.A. 42), had admitted to being a "ranking member in this organization" (*ibid.*), and because respondent had allowed Ehle, when the two shared a cell, to read a letter from Mills that confirmed their membership in the Brotherhood (J.A. 42, 46-47, 48-49). Ehle, too, admitted to being "directly connected" with the secret prison group (J.A. 44).

[7] During the conference on the jury instructions, defense counsel offered only one additional instruction (3 Tr. 535), which concerned how the jury should construe the testimony of a witness who asserts his Fifth Amendment privilege. That instruction was given (6 Tr. 639-640).

2. A divided court of appeals reversed respondent's conviction.[8] Conceding that a trial court has broad discretion to admit or exclude evidence (Pet. App. 6a), the court of appeals nevertheless held that the trial judge had committed reversible error by allowing Mills to be impeached by proof that he and respondent belonged to a group whose members were sworn to commit perjury on each other's behalf (*id.* at 5a).

Observing that the government may not convict an individual merely for belonging to an organization that advocates illegal activity (*Scales* v. *United States*, 367 U.S. 203, 219-224 (1961); *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969)), the majority reasoned (Pet. App. 5a):

> Neither should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value. It establishes nothing about the individual's own actions, beliefs or veracity.

The majority added that the "suggestion of perjury, based purely on a group tenet, without any showing that Mills personally accepted such a tenet, * * *

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[8] The court of appeals upheld the denial of respondent's motion to suppress the money found on his person after his arrest (Pet. App. 2a-3a). The court held that the sheriff's officers had probable cause to arrest respondent and that the search was properly made incident to arrest (*ibid.*). For the same reason, the court upheld the denial of respondent's motion to suppress the shirt found on the seat of the pickup (*id.* at 3a n.1).

Because of its disposition of the impeachment issue, the court of appeals did not decide whether the trial judge erred in refusing to permit respondent to call an alibi witness whose name did not appear on respondent's notice of intention to offer an alibi defense (Pet. App. 4a).

makes such testimony unacceptable" (*id.* at 6a). The court also found that the rebuttal testimony had unfairly prejudiced respondent "by mere association" (*id.* at 7a).

Judge Kennedy dissented (Pet. App. 8a-10a). He stated (*id.* at 8a) that "[t]he line of questioning barred by the majority in this case is akin to inquiry respecting family ties, prior business relations, or the myriad other past or present associations that may cause a witness, consciously or otherwise, to color his testimony. There is consensus that such matters are admissible, as probative on the issue of bias." He added (*ibid.*) that "if the tables were turned and a key prosecution witness were a member of a gang such as the one here, I should think it would be error to reject defense efforts to show bias through gang membership. See *Davis* v. *Alaska*, 415 U.S. 308, 316-317 * * * (1974)."

Judge Kennedy found *Scales* and *Brandenburg* inapposite because "[t]hey stand only for the proposition that membership alone is not sufficient for the imposition of a penalty" and do not preclude consideration of membership in assessing a witness's possible bias (Pet. App. 9a). He elaborated (*ibid.*): "The witness who is impeached by membership in a group sworn to perjury is subject to no sanction other than that his testimony may be disbelieved."

Judge Kennedy stated (Pet. App. 10a) that a trial judge has discretion to admit extrinsic evidence showing bias, and he concluded (*ibid.*) that the trial judge in this case had not abused that discretion in holding that the probative value of Ehle's testimony outweighed the possibility of unfair prejudice to respondent.

SUMMARY OF ARGUMENT

Mills, who testified for the defense in this bank robbery prosecution, was properly impeached by the admission of evidence that both he and respondent belonged to "a secret prison organization" whose members are sworn to lie to protect each other. The court of appeals' decision holding that such proof is inadmissible is a startling departure from settled law regarding proof of a witness's bias and is supported by neither precedent nor reason.

1. One of the primary functions of the trier of fact in any legal proceeding is to assess the credibility of the witnesses, and one of the best ways of making that assessment is to examine whether a witness is "biased," *i.e.*, whether he has any motive to lie or slant his testimony. For this reason, it is firmly established that proof of a witness's bias is always relevant. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). Indeed, evidence of bias is regarded as so important in evaluating credibility that such proof is never regarded as collateral and may therefore be established by extrinsic evidence.

The facts from which bias may be inferred are enormously varied. Any evidence showing that a witness has cause to favor or disfavor one of the parties is relevant. As stated in *McCormick on Evidence* § 40, at 78 (E. Cleary 2d ed. 1972):

> Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility. The kinds and sources of partiality are so infinitely varied to be here reviewed * * *.

Clearly, one of the circumstances from which bias may often reasonably be inferred is membership by the witness and a party in the same voluntary or-

ganization. Persons who chose to join the same group, especially relatively close-knit ones, tend to have something in common. They may know each other personally; they may have mutual friends and acquaintances; or they may share the same goals, beliefs, interests, tastes, or experiences. Common sense and experience indicate that, consciously or not, a member of a close-knit voluntary group is more likely to give testimony favorable to a fellow member than to another party. Common membership in such a group is something that a rational trier of fact would wish to know, and is generally entitled to know, in evaluating credibility. Such evidence easily meets the test of relevancy in Fed. R. Evid. 401, *i.e.*, "evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (emphasis added).

2. As noted, the law permits proof of relationships from which bias may be inferred, including common membership in a group, because of the recognition that such relationships may affect a witness's testimony. Even though members of most organizations are not sworn to lie on each other's behalf, evidence of membership in such organizations is admissible to show bias because the trier of fact is permitted to infer that the witness's testimony may be slanted in favor of a fellow member. In this case, the trier of fact was not called upon to infer from simple shared membership in a prison gang that Mills might have slanted his testimony to protect respondent, a fellow member. Instead, the evidence of common membership was reinforced by direct proof that members of the group were sworn to commit perjury on each other's behalf. Since this direct evidence showed

essentially what the trier of fact would have been permitted to infer from the bare fact that Mills and respondent both belonged to the same group, its admission cannot have been error.

3. The court of appeals' reasons for holding to the contrary were insubstantial. The court reasoned (Pet. App. 5a) that since "the government may not convict an individual merely for belonging to an organization that advocates illegal activity * * * [n]either should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value."

The court confused two fundamentally different concepts: those matters that may be made a crime and those matters that may be considered in determining whether a crime has been committed. For example, it is obvious that characteristics such as race, gender, and age may not be made a crime. But there is no doubt that such characteristics may be proved in criminal trials where relevant. For instance, race or gender may be relevant to identification, and age may be relevant if physical strength is at issue. Proof of group membership stands on the same footing. Even though mere membership generally may not be made a crime, membership may be proved where relevant, including where relevant to show bias.

The court of appeals' pronouncement that "membership, without more, has no probative value" (Pet. App. 5a) is contrary to common sense. In a trial for murder resulting from a rifle shot fired at long range, would the defendant's membership in a rifle club have "no probative value"? In a trial for counterfeiting, would membership in a printer's union be irrelevant? Proof of membership alone would rarely if ever be conclusive, but it would surely be relevant.

Finally, the court of of appeals suggested (Pet. App. 6a) that its decision was necessary to protect Mills's freedom of association. But if First Amendment associational rights are not abridged by proof that a witness is married to the party for whom he or she testifies, we fail to see how Mills's or respondent's First Amendment rights were violated in this case by proof that they belonged to the same prison gang.

4. In sum, no legal rule bars admission of evidence such as that at issue here. That evidence was plainly relevant to show Mills's bias, and after careful consideration and appropriate measures to reduce the risk of prejudice the trial court properly refused to exclude it under Fed. R. Evid. 403. The court of appeals' decision is devoid of precedential or rational support and should be reversed.

ARGUMENT

WITNESS MILLS WAS PROPERLY IMPEACHED WITH REBUTTAL TESTIMONY THAT BOTH HE AND RESPONDENT BELONGED TO A PRISON ORGANIZATION WHOSE MEMBERS WERE SWORN TO COMMIT PERJURY FOR EACH OTHER

A. Proof Of A Witness's Bias Is Always Relevant

The importance of evidence of a witness's bias is well recognized. As this Court has stated: "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974), quoting 3A Wigmore, *Evidence* § 940, at 775 (Chadbourn rev. ed. 1970). Accord, 3 Weinstein & Berger, *Weinstein's Evidence* ¶ 607[03], at 607-30-607-32 (1982); *McCormick on Evidence* § 40, at 78 (E. Cleary 2d ed. 1972); 3 Louisell & Mueller, *Federal Evidence* § 341, at 470-484 (1979). Indeed, that is precisely what respondent was doing in calling Mills to give evidence about Ehle's motive for testifying against respondent, and no one could seriously suggest that such evidence was inadmissible.

Proof of bias is considered so important in assessing the weight to be given to testimony that such proof "is never considered collateral: Extrinsic evidence of bias, or of facts from which it may be inferred, may be introduced even after the witness has denied the bias, or the facts, on cross-examination." 3 Louisell & Mueller, *supra*, § 341, at 470-471 (footnote omitted); see also, *e.g.*, *United States* v. *Frankenthal*, 582 F.2d 1102, 1106 (7th Cir. 1978); *United States* v. *Brown*, 547 F.2d 438, 445-446 (8th Cir.), cert. denied, 430 U.S. 937 (1977); *United States* v. *Harvey*, 547 F.2d 720, 722 (2d Cir. 1976); *United States* v. *Robinson*, 530 F.2d 1076, 1079-1082 (D.C. Cir. 1976); *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir.), cert. denied, 409 U.S. 863 (1972).

Even when the framers of the Federal Rules of Evidence believed that a generic type of evidence was so inherently unreliable as to be inadmissible in connection with general credibility, as in the case of religious beliefs or opinions (Fed. R. Evid. 610), they were careful to note that "disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule." Fed. R. Evid. 610 advisory committee notes (proposed).[9]

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[9] There are other situations in which such extrinsic evidence is admissible to show bias even though it would otherwise be excluded. For example, in *United States* v. *Robinson*, 530 F.2d 1076 (D.C. Cir. 1976), the defendant described his relationship with his alibi witness Luke as a friendship that included occasional borrowing and lending of money between paydays. On cross-examination, the defendant denied any conversations

Tempering the rule that permits proof of a witness's bias is the recognition that "the trial judge may * * * in both civil and criminal cases, impose reasonable limits upon attempts to show bias in the interest of preventing harassment of witnesses, unfair prejudice to parties, confusion of issues, or undue consumption of time, all pursuant to Rules 403 and 611 [of the Federal Rules of Evidence]." 3 Louisell & Mueller, *supra*, § 341, at 471-473 (footnote omitted). That was done here when the trial court prohibited the unnecessary and potentially prejudicial mention of the name of the Aryan Brotherhood.

B. Bias May Be Shown By Proving That A Witness And A Party Belong To The Same Group

Evidence of a witness's bias is admitted because the law recognizes "the slanting effect upon human testimony of the emotion or feelings of the witness

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with an Officer Walker. 530 F.2d at 1079. Luke, the alibi witness, corroborated the defendant's testimony and further denied any business relationship with the defendant (*ibid.*). On rebuttal, Officer Walker testified that Luke had driven the defendant to the scene of a narcotics transaction, that the defendant had told Officer Walker that he and Luke were joint venturers in the drug business, and that Luke had sold drugs to Officer Walker (*ibid.*). Although evidence of bad acts is not admissible to prove a person's character (Fed. R. Evid. 404(b)), the court of appeals upheld the admission of Officer Walker's testimony because it "was aimed at showing specific matters * * * probative of Luke's bias." (530 F.2d at 1080). Once the defendant and Luke had portrayed their relationship as a simple friendship with no business overtones and had denied any contact with Walker, "it was open to the government * * * to reveal aspects of Luke's relationship evidencing a special partiality toward defendant and particular motive to testify falsely on his behalf" (*ibid.* (footnote omitted)).

toward the parties." *McCormick on Evidence*, *supra*, § 40, at 78. Common sense and experience suggest that a witness will tend to give testimony favorable to a party he likes and unfavorable to a party he dislikes. Thus, any evidence from which partiality may be inferred—including common membership in a group—is important in assessing a witness's credibility. As McCormick puts it (*ibid.*):

> Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility. The kinds and sources of partiality are too infinitely varied to be here reviewed * * *.

See also 3 Louisell & Mueller, *supra*, § 341, at 470-484; 3A Wigmore, *supra*, § 949, at 784-786. Another commentator states (3 Weinstein & Berger, *supra*, ¶ 607[03], at 607-30-607-32 (footnotes omitted)): "Relationships between a party and a witness are always relevant to a showing of bias whether the relationship is based on ties of family, sex * * *[,] employment, business, friendship, enmity or fear."

The fact that the group involved in this case is the Aryan Brotherhood rather than, say, the Elks or the Patrolmen's Benevolent Association has no bearing upon the relevance of the evidence of Mills's and respondent's common membership. The inference arising from common group membership—that members may slant their testimony to favor each other—is at least as strong. It is of course undeniable that proof of membership in a controversial or notorious group may carry a far greater risk of unfair prejudice to the party. But that problem is addressed, in this as in other contexts, by Fed. R. Evid. 403, which gives a trial court discretion to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the is-

sues, or misleading the jury," or by certain other factors. Unless the trial court can be said to have erred in its application of Rule 403, the admission or exclusion of evidence of common group membership must be sustained.

Respondent has conceded (Br. in Opp. 2), as he must, that it is permissible to examine a witness's "relationship to [a] party" in order to show bias. But for reasons that respondent does not explain, he draws a distinction between such a "relationship" and common group membership (*ibid.*). In fact, however, common group membership is merely one type of relationship that may exist between a party and a witness. Depending upon the nature of the group, the inference of bias arising from common membership may be stronger or weaker than that arising from other relationships. Common membership in very large, diverse, and loosely knit groups may give rise to little, if any, inference of bias. In the case of other groups, the bonds even among members who do not know each other may be stronger in some respects than ties of family or friendship among many other persons.[10] This would appear to be true of certain organized crime groups and gangs, whose members are sometimes sworn to commit perjury or even murder on each other's behalf.[11] Assessing the probative value of common membership in any particular group is a matter for the trial court, in applying Fed. R. Evid. 403, and ultimately, if the evidence is admitted, for the trier of fact.

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[10] In this case, of course, Mills and respondent did know each other (see J.A. 32).

[11] See, *e.g.*, *United States* v. *Bufalino*, 683 F.2d 639, 647 (2d Cir. 1982) (members of Cosa Nostra "performed murders for one another as a matter of professional courtesy").

C. Evidence That Members Of A Group Are Sworn To Commit Perjury On Each Other's Behalf Is Even More Probative Of Bias Than Evidence Of Mere Common Membership And Is Thus Clearly Relevant

1. In part, the court of appeals appears to have objected to the government's rebuttal evidence because it was *too probative* of Mills's basis. The court wrote (Pet. App. 6a):

> Ehle's testimony was not simply a matter of showing that Abel's and Mills' membership in the same organization might "cause [Mills], consciously or otherwise, to color his testimony." *See* dissent at [Pet. App. 8a]. Rather it was to show as well that because Mills and Abel were members of a gang whose members "will lie to protect the members," Mills must be lying on the stand.

This reasoning is especially faulty. Although members of fraternal organizations, country clubs, alumni associations, professional groups, and most other organizations are not sworn to lie for each other, evidence of membership in such organizations is admissible to show bias because the trier of fact is permitted to infer that the witness's testimony may be slanted in favor of a fellow member. In this case, the trier of fact was not merely called upon to infer from simple shared membership in a prison gang that Mills may have slanted his testimony to protect a fellow member. Rather, that evidence bearing quite rationally on Mills's credibility was reinforced by direct evidence showing essentially what the trier of fact would have been permitted to infer from the bare fact that Mills and respondent both belonged to the same group.

The court of appeals' decision, insofar as it appears to turn on the higher probative value of evidence of agreement to commit perjury, leaves an irrational hole in the permitted methods of establishing a witness's bias. Presumably the court would have allowed the admission of evidence showing that Mills himself had expressed an intent to lie to protect respondent or other members of the Aryan Brotherhood, and the court distinguished the present case from those in which mere group membership is shown and the trier of fact is left to infer that the witness might slant his testimony in favor of a fellow member. If bias may properly be shown in these ways, we fail to see why it may not be established by the evidence introduced in this case.

As Judge Kennedy pointed out in dissent (Pet. App. 8a), if Mills had been a prosecution witness (for example, in a case brought against a member of a rival prison gang charged with having assaulted respondent), it would almost certainly have been error to preclude the defense from showing that Mills and respondent belonged to a group whose members are expected to commit perjury for each other. See *Davis* v. *Alaska*, 415 U.S. at 316-317. There is no reason why defense witnesses should be treated any differently. If, for example, both sides in a criminal trial called members of gangs with tenets similar to the Aryan Brotherhood's (a realistic possibility in light of the proliferation of antagonistic prison gangs), it would be a travesty if the defense could attack the credibility of prosecution witnesses by proving their group membership while the government was barred from introducing similar evidence regarding the defense witnesses.

2. The court of appeals offered several additional reasons why the trial judge should not have admitted

the rebuttal testimony at issue, but none of those reasons is valid.

The court suggested (Pet. App. 6a) that its decision was necessary to protect Mills's freedom of association. However, even if membership in a prison gang were fully protected by the First Amendment (but see *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 125-133 (1977)),[12] the effect upon First Amendment interests in the present case was surely no greater than when a witness is impeached by proof of family relationship. If First Amendment associational rights are not abridged by proof that a witness is married to the party for whom he or she testifies, we fail to see how Mills's or respondent's First Amendment rights were violated in this case by proof that they belonged to the Aryan Brotherhood.[13]

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[12] See also *United States* v. *Fitzgerald*, 724 F.2d 633, 639-640 (8th Cir. 1983) (en banc) (Arnold, J., concurring) (questioning whether membership in Hell's Angels is protected by First Amendment).

[13] In an analogous situation, courts have found no First Amendment infringement from carefully drawn warrants authorizing the search and seizure of indicia of membership in or association with the Hell's Angels. *United States* v. *Rubio*, 727 F.2d 786 (9th Cir. 1983); *United States* v. *Apker*, 705 F.2d 293, 305-306 (8th Cir. 1983), cert. denied, No. 83-600 (Jan. 23, 1984); see *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 565 (1978). Nor have courts, including the Ninth Circuit, found any First Amendment obstacles to the admission of evidence showing identification with, or membership in, a religious organization such as the Black Muslims so long as such association was relevant to the issues at trial. *United States* v. *Akbar*, 698 F.2d 378 (9th Cir.), cert. denied, No. 82-6497 (May 31, 1983); *United States* v. *Dickens*, 695 F.2d 765, 772-774 (3d Cir. 1982), cert. denied, No. 82-6376 (Apr. 18, 1983).

The court of appeals also reasoned (Pet. App. 5a) that since "the government may not convict an individual merely for belonging to an organization that advocates illegal activity * * * [n]either should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value." The court, however, confused two fundamentally different concepts: those matters that may be made a crime and those that may be considered in determining whether a crime has been committed. For example, it is obvious that characteristics such as race, gender, and age may not be made a crime. But there is no doubt that such characteristics may be proved in criminal trials where relevant. For instance, race or gender may be relevant to identification, and age may be relevant if physical strength is at issue. Proof of group membership stands on the same footing. Even though mere membership generally may not be made a crime, membership may be proved where relevant, including where relevant to show bias.

The court of appeals' reasoning suggests that evidence bearing upon a witness's credibility may not be admitted unless it is sufficient to prove a criminal offense. That principle would revolutionize the law of evidence and lead to patently absurd results. For example, under present law a witness may be impeached by proof of his reputation for untruthfulness (Fed. R. Evid 608(a)) even though persons may not be convicted solely because of their reputations. Likewise, although family relationships are not a crime, it is universally recognized that a witness may be impeached by showing that he or she is related to one of the parties. Under the court of appeals' reasoning, all this would have to change. For example, since

motherhood is not a crime, it would seem to follow that a jury could not be permitted to learn that the sincere and convincing witness who testified for the defense was in fact the defendant's mother.

The court of appeals' pivotal pronouncement that "membership, without more, has no probative value" is equally wrong. As previously discussed, membership is relevant to show sympathy with or partiality for fellow members. Proof of membership in a voluntary organization is also relevant to show that the member possesses the group's shared characteristics. Membership may provide evidence that the member possesses a skill (*e.g.*, the Professional Golfers Association) or has undergone an experience (*e.g.*, the Veterans of Foreign Wars). Contrary to respondent's contention (Br. in Opp. 4), membership may be relevant to show numerous personal characteristics, such as intelligence (the Mensa Club), sobriety (a temperance organization), chastity (certain religious orders), or frugality (a payroll savings plan).

Membership is also clearly relevant to show a person's beliefs; people are much more likely to join a group with which they agree than one with which they disagree. The relevance of membership to prove beliefs is illustrated by the hypothetical situation posed by respondent himself (Br. in Opp. 4-5)—"a case where a Ku Klux Klansman is charged with the homicide of [a] black man." In that case, the hypothetical defendant's membership in the Klan would be relevant if the facts suggested that the crime was racially motivated. Evidence that the defendant had personally espoused the Klan's tenets, while obviously more probative than bare proof of membership, would not be essential to show his racial attitudes. The trier of fact would be entitled to infer that a

member of the Klan was sympathetic to the Klan's central beliefs.[14]

A similar inference was entirely permissible in the present case. Having heard evidence that Mills and respondent belonged to a secret prison organization and that members of that group are sworn to lie on each other's behalf, the trier of fact was entitled to conclude that Mills endorsed and put into practice the group's beliefs.[15]

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[14] See *United States* v. *Redwine*, 715 F.2d 315, 316 (7th Cir. 1983), cert. denied, No. 83-6378 (May 29, 1984) (evidence that defendant wore Ku Klux Klan insignia and spoke of his Klan membership admitted in prosecution for violating civil rights statutes).

[15] Unlike the majority below, other courts of appeals have sanctioned proof of membership in highly controversial groups. In *United States* v. *Bufalino, supra*, the defendant was charged with attempting to arrange for the murder of a witness against him. The government's theory was that the defendant could prevail upon a fellow prisoner to commit the murder because "both were members of La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy" (683 F.2d at 647). On direct examination, the defendant claimed that his acquaintance with the other prisoner was based on "chance meetings" (*ibid.*). The Second Circuit held that it therefore "became proper for the government to impeach him by introducing evidence of [his] longstanding relationship with La Cosa Nostra" (*ibid.*). Similarly, in the present case, when Mills denied belonging to a secret prison organization whose members are sworn to lie on each other's behalf, it became proper to impeach him by introducing evidence of his membership in such a group.

In *United States* v. *Mills, supra*, another case involving the Aryan Brotherhood, the defendant (who was not the same person who testified for respondent here) was charged with murdering a fellow prison inmate. The prosecution's theory was that the murder was the result of a "contract" put out by

It should be emphasized that in all of the above examples we are arguing only that proof of membership is relevant, *i.e.*, that it has some "tendency to make the existence of any fact that is of consequence to the determination of the action more prob-

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the Aryan Brotherhood to avenge cheating in a drug transaction. Upholding the admission of testimony on the organization, history, and activities of the Aryan Brotherhood, the Eleventh Circuit wrote (704 F.2d at 1559):

> To make the crime comprehensible to a jury it was necessary for the government to show how the Aryan Brotherhood functioned, that Mills was a member of the Aryan Brotherhood, that an affront to a fellow member might serve as an adequate motivation for Mills to kill a person whom he barely knew, and that it was possible for a member of the Brotherhood incarcerated in one federal prison to communicate the murder contract to another member in a different prison, despite mail censorship and restrictions on inter-inmate correspondence.

The court also upheld the admission of testimony of government witnesses concerning "their intense, deathly fear of the Aryan Brotherhood" (704 F.2d at 1560). The court found that this testimony was properly admitted to counter defense efforts "to impeach the credibility of the government witnesses by proving that they had agreed to testify falsely for the government to manipulate their way into the 'country club' conditions of the Witness Protection Program" (*ibid.*).

In a case involving a series of bombings in 1970 in the Kansas City area, the Eighth Circuit upheld the admission of evidence regarding the history, development and goals of the Students for a Democratic Society (SDS) because it was relevant "to show the association of the appellants with one another prior to the date fixed in the indictment * * *, and the intent, purpose, aim and motives of the parties to the conspiracy." *United States* v. *Baumgarten*, 517 F.2d 1020, 1029 (8th Cir.), cert. denied, 423 U.S. 878 (1975). See also, *e.g.*, *United States* v. *Redwine, supra* (proof of membership in Ku Klux Klan); note 13, *supra* (cases allowing proof of membership in Hell's Angels and Black Muslims).

able or less probable than it would be without the evidence" (Fed. R. Evid. 401). We are not arguing that such evidence must always be admitted; in every case, the trial court would have to consider carefully whether the evidence, although relevant, should nevertheless be excluded under Fed. R. Evid. 403. And we are certainly not arguing that evidence of membership in a voluntary group is conclusive proof that the member shares his co-members' beliefs or other attributes, or even that he likes his fellow members. Evidence refuting the proof of bias would be admissible, and certainly such evidence was not barred here.

D. The District Court In This Case Properly Concluded That The Probative Value Of The Evidence At Issue Outweighed The Possibility Of Unfair Prejudice

Since the government's rebuttal evidence was clearly relevant to show bias, the only remaining question is whether the trial judge properly refused to exclude that evidence under Fed. R. Evid. 403. As previously noted, Rule 403 allows a trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court's ruling under Rule 403 must be affirmed unless it constitutes a clear abuse of discretion. See *United States* v. *Alessandrello*, 637 F.2d 131, 146 (3d Cir. 1980); *United States* v. *Ford*, 632 F.2d 1354, 1377 (9th Cir. 1980); *United States* v. *Masters*, 622 F.2d 83, 88 (4th Cir. 1980).

As Judge Kennedy concluded in dissent (Pet. App. 10a), the trial court's ruling in this case was well within its discretion. Before deciding to admit the

contested rebuttal testimony, the district court gave extensive audience to the arguments of counsel and carefully balanced the relevant factors. The court concluded (J.A. 29):

> There's no question that this evidence is probative, relevant, admissible, as it goes directly to the credibility of Mr. Mills and is at the heart of the credibility of Mr. Mills. Certainly his testimony is a critical area in this case, because it reflects directly upon the Government's "star witness," and the government should be entitled by fair means to assess and attack the credibility of that particular witness.
>
> Based upon the offer of proof, which is a substantial offer of proof * * * it seems to the Court that the Government should be entitled to attack the credibility of Mr. Mills. I have determined that the probative value of this evidence does outweigh the prejudicial value * * *.

Although the court decided to admit proof of Mills's and respondent's membership in a group whose members were sworn to lie on each other's behalf, the court barred any mention of the group's potentially inflammatory name and insisted that it be called only a secret prison organization. The court also offered to give an instruction limiting the testimony regarding the group to the issue of credibility.

It is true that respondent's membership in a secret prison organization was not directly relevant to his guilt or innocence on the bank robbery charge and would have been inadmissible in the prosecution's case-in-chief under Fed. R. Evid. 404(b). Had respondent not chosen to offer Mills as a witness, there would have been no risk of prejudicing him in the eyes of the jury on the basis of his membership. But once he decided to offer Mills's testimony, any specu-

lative prejudice to him was outweighed by the clear need to permit the jury to learn the powerful evidence of bias without which Mills's credibility could not be fairly assessed.

There is no basis for reversing the trial court's application of Rule 403.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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